

**FRANK'S
APPEAL TO
HIGH COURT
HEARD
BY JUSTICE
LAMAR**

Petition for Writ of Error
May

Be Passed Up to Full
Bench
of Supreme Court for
Deci-
sion

SIMILAR POINT ONCE
BEFORE THAT
TRIBUNAL

Judge Lamar, in
Minority

Opinion, Has Held
Defend-

ant Cannot Waive Right to Be Present at Trial

Justice Joseph R. Lamar, of the United States Supreme Court, Saturday heard the petition of Leo M. Frank for a Writ of Error, already refused him by the Supreme Court of Georgia, on which his Case can be given a hearing by the nation's highest Court.

Judge Lamar, in all probability, will not announce his decision Saturday afternoon, the Case being considered of so much importance, it is said, that he may place it before the entire Court before he announces the decision on the Application for a Writ of Error.

This news comes to *The Journal* through Washington dispatches, which say that at 1 o'clock (noon Atlanta time) Judge Lamar received Frank's Attorneys, Henry Peeples and H. A. Alexander, at his residence, to hear their arguments.

The Washington dispatches say Judge Lamar is likely to pass the present Case, the petition for a Writ of Error, up to the full Court in view of his dissenting opinion in the Case of Diaz vs. the United States, reported in Volume 322 of the United States Supreme Court Reports, where the issue involved the Frank appeal, the absence of a defendant from the Court Room at the time of the rendition of the verdict, played an important part.

The Diaz Case is likely to be extensively quoted by Frank's Attorneys for even the decision of the majority of the Court, affirming the decision of the Lower Court, contains points favorable to Frank, while Judge Lamar went further than the other members of the Court, and would have reversed the judgment.

Judge Lamar, in his dissent in the Diaz Case, by a particular chance, quotes the Case of Nolan vs. the State of Georgia, which was extensively used by Frank's Attorneys in their fight on the motion to set aside in the state Supreme Court.

The Case of Gabriel Diaz is interesting in itself. Diaz was charged in the Philippine Courts with "homicide," having beaten and kicked to death a man named Alcazaren. The trial was conducted like civil litigation, two recesses, one of more than a month, being taken. When the trial resumed after one of the recesses, Diaz waived his right to be present in a Telegram to the Court and the trial proceeded, witnesses testifying and arguments being made in his absence. Finally, three months after the trial, which was not by jury, the verdict or decision was rendered and he was found guilty and sentenced to six years in the penitentiary, the judgment being made in his absence.

He appealed and the Supreme Court of the Philippines, which, admitting that there were "irregularities and deficiencies" in the prosecution, ordered the penalty to be increased to fourteen years.

Judge Lamar in dissenting says: "In my opinion, the conviction was not only erroneous because the defendant was not present when witnesses were examined and arguments made, but having been unlawfully put in double jeopardy and judgment equivalent to a verdict having been pronounced in his absence, he is entitled to his discharge." Here the Justice cites the Nolan Case. His last phrase is interesting as it seems to bear out the contention that if the United States Court should sustain the motion to set aside it would not give Frank a chance for life by a new trial, but his complete freedom without another trial.

Continuing Justice Lamar scores the Philippine Supreme Court saying: "It was worse to appeal than to submit by judgment, although the record of the Supreme Court of the Philippines admits that the prosecution has "irregularities and deficiencies."

The Court, in the controlling opinion in the Diaz Case, holds that a defendant, who is not in the Custody of the Court, but is out on bail, cannot take advantage of his voluntary absence from a part of the trial.

Continuing, however, the opinion says: "The rule may be otherwise in Cases that are capita where the accused is in the custody of the Court."

Justice Lamar Takes Case Under Advisement

(By Associated Press.)

WASHINGTON, Nov. 21.—Justice Lamar today took under consideration the Application of Attorneys for Leo M. Frank for a Writ of Error directing the Georgia Courts to send to the Supreme Court for review the record on which the factory superintendent was convicted and sentenced to death for the murder of Mary Phagan.

For an hour and a half, the Attorneys argued that Frank had been denied a federal right, when the jury returned its verdict during his absence from the Court Room. As they left the Justice's home, they stated that they did not expect him to announce his decision on the Application for several days.

Louis Marshall, of New York, left the city this afternoon after making his argument to the Justice for Frank, but Henry Peeples and Harry Alexander, of Atlanta, also of Counsel for Frank, remained in the city, possibly to present the Application to other Justices should Justice Lamar decline to issue the Writ.
